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LEE YIK CHIEH & ORS v. OTL ASIA SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AZHAHARI KAMAL RAMLI JCA
WAN AHMAD FARID SALLEH JCA
B [CIVIL APPEAL NO: P-02(NCvC)(W)-2102-12-2023]
15 OCTOBER 2025

Abstract – *(i) A breach of confidence occurs when there is unauthorised use of company's confidential information and document, and such usage is detrimental to the aggrieved company causing financial losses to its business. Employees who leave a company ought to return the confidential information and document to the company upon leaving it as those are critical and essential company information; (ii) When employees and key personnel set up a direct competing company almost immediately after leaving its previous company, and utilises the latter's confidential information, this infers that there is a conspiracy among them to injure the aggrieved company, for the purpose of enhancing their new venture and business. In such scenario, a claim of conspiracy to injure is proved and established.*

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TORT: *Breach of confidence – Duty of confidentiality – Confidential information and document belonging to aggrieved company – Whether there was unauthorised use of information by employees of aggrieved company – Whether detrimental to aggrieved company – Whether confidential information and document used to facilitate setting up of competing company – Whether aggrieved company suffered financial loss – Whether elements of breach of confidence established*

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TORT: *Conspiracy to injure – Elements – Unauthorised use of confidential information by employees of aggrieved company to facilitate setting up of new competing company – Creation of template general letter to introduce new rival company to customers of aggrieved company – Whether new company's product direct copy of aggrieved company's system – Whether conspiracy to injure proved*

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CONTRACT: *Breach – Confidentiality – Confidential information and document – Whether there was unauthorised use of information by employees of aggrieved company – Whether detrimental to aggrieved company – Whether usage of confidential information and document to facilitate setting up of competing company – Whether aggrieved company suffered financial loss – Whether elements of breach of confidence established*

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This was an appeal by the appellants ('defendants') against the decision of the Judicial Commissioner ('JC') in allowing the claim of the respondent ('plaintiff') founded on breach of confidence and conspiracy to injure. The plaintiff was a company providing transportation and warehousing related services and management support services. The first defendant was the

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marketing manager of the plaintiff while the second defendant was the general manager. The third defendant was a company in the business of providing similar services as the plaintiff in cross-border transportation. Clause 8 of the first and second defendants' letter of employment with the plaintiff provided that the first and second defendants were required, during their employment with the plaintiff, to act in the best interest of the plaintiff. As part of its business operation, the plaintiff issued a company handbook ('company handbook'), which the first and second defendants were obligated to comply with such as, *inter alia*, duty of confidentiality. In the course of their employment, the first and second defendants were given access to various extremely valuable confidential documents and data belonging to the plaintiff. Subsequently, the first and second defendants resigned. The first defendant then became the third defendant's Chief Executive Officer ('CEO') while the second defendant was the third defendant's Chief Operation Officer ('COO'). A forensic investigation was conducted by the plaintiff and it was discovered that (i) the first defendant had, before ceasing his employment with the plaintiff, downloaded, extracted and/or removed confidential information and documents from the plaintiff for his own safekeeping; and (ii) the second defendant had also explicitly downloaded, extracted and/or removed confidential information and documents belonging to the plaintiff by forwarding the same to his personal email account and copying the said emails to an unknown third party. The plaintiff's confidential information and documents were retained and/or extracted by the first and second defendants without obtaining any authorisation and/or consent from the plaintiff. The plaintiff asserted that the confidential information and documents were exclusive to the plaintiff and could not be found in the public domain, and any unauthorised use by the defendants or any third party would result in severe consequences and damage to the plaintiff. It was contended by the plaintiff that the retention and/or extraction of the plaintiff's confidential information and documents by the first defendant and/or the second defendant was done to fulfil and/or facilitate the setting up of the third defendant and to assist with the operation of the third defendant. Subsequently, the plaintiff discovered that the first defendant and/or the second defendant had approached six of the plaintiff's existing customers to promote the third defendant and subsequently offer services of the third defendant. The plaintiff also contended that the first and second defendants had breached their duty of confidentiality, loyalty, honesty, good faith and fidelity and ultimately breached the express and/or implied terms and condition of their letter of offer of employment and the company handbook. In allowing the plaintiff's claim, the JC ruled that (i) the terms of the company handbook were binding on the first and second defendants; (ii) both the first and second defendants did not produce evidence that either they asked for, or were given the authority or permission to download the plaintiff's confidential information and documents onto an external hard

drive, or to forward them to their personal accounts; (iii) the plaintiff had suffered detriment as there was cause and effect between the third defendant starting its business and the plaintiff's continuous drop in monthly revenue. The JC found that the first, second and third defendants were liable to the plaintiff for the tort of breach of confidence. On the claim of tort of conspiracy to injure, the JC found that the first and second defendants authored a template general letter to introduce the third defendant and its business to potential customers in which the first and second defendants offered the use of a state-of-the-art appliance which was named the 'Smart Lock'. The JC found that the first and second defendants' 'Smart Lock' was a direct reference to the plaintiff's 'E-Lock'. On a balance of probabilities, the JC ruled that the first, second and third defendants' direct reference to the features of the plaintiff's 'E-Lock' constituted either an agreement or a combination among the first, second and third defendants to get an advantage over the plaintiff, with the purpose of injuring the plaintiff. The JC also found proof of conspiracy to injure from the fact that the first defendant had incorporated the third defendant while he was still in the employment of the plaintiff, and hence still obligated to serve the plaintiff. The third defendant was the direct competitor and the evidence showed that there was real and serious risk of diversion of business from the plaintiff to the third defendant. The JC held that the plaintiff had proved its case against the defendants. Hence, this appeal. The issue that arose was whether the elements of breach of confidence and conspiracy to injure had been established by the plaintiff.

Held (dismissing appeal)
Per Azhahari Kamal Ramli JCA delivering the judgment of the court:

(1) The defendants were challenging the JC's finding that there was unauthorised use of the information to the detriment of the party communicating it. By this concession, the defendants admitted the confidential nature of the plaintiff's confidential information and documents; and the plaintiff's confidential information and documents were imparted to them in circumstances importing an obligation of confidence. The first and second defendants had, at all times, intended to use the plaintiff's confidential information and document to facilitate the setting up of the third defendant. The information in the plaintiff's confidential information and document may be gathered by the defendants in the making of their own market survey and doing their own compilation on, among others, the pricing, routes and particulars of customers, it did not make the existing confidential information and document which the first and second defendants had downloaded and kept, less confidential. These information gave the defendants an advantage when starting their business which was similar to the plaintiff's. It was the head start that the defendants would gain by harnessing such confidential information and document to gain an unfair

advantage in a quick start-up. In any event, the first and second defendants ought to return the confidential information and document in the external hard drive upon leaving the plaintiff as these were critical and essential company information. (paras 61, 72 & 74)

(2) From the plaintiff's group of companies' statement of account, there was a steady decline of revenue from January 2019 to July 2019 compared to a steady six-figure revenue from August 2019 to July 2019. It was also shown that there was no business coming from WICE at all starting from August 2019 until February 2020. The plaintiff's operating profit margins (OPM) from August 2018 to December 2018 also showed a consistent loss compared to positive figures between May 2018 to July 2018. The plaintiff also suffered a culminated loss of – 6.19% for the year 2019 and as at February 2020, its OPM showed a substantive drop to – 13.90%. The statement of account showed that the plaintiff had suffered financial loss almost immediately after the first and second defendants left the plaintiff and the setting up of the third defendant. It was not unreasonable to infer that the plaintiff's financial losses were caused by the unauthorised use of the plaintiff's confidential information and document. The detriment suffered by the plaintiff was in the form of financial loss in its business. There was unauthorised use of the plaintiff's confidential information and document to the detriment of the plaintiff. (paras 77-79)

(3) The plaintiff's claim for conspiracy to injure was fortified by the following facts: (i) the first and/or the second defendant created a template general letter to introduce the third defendant and its business to its customers. In this letter, the first and second defendants offered the use of a state-of-the-art appliance which they named 'Smart Lock' which the first and second defendants described as 'an inner locking device using WiFi signal to upgrade the reliability on the activation and deactivation of the inner locking mechanism'; (ii) in this introduction letter, the first and second defendants represented to the recipients of the letter that they brought with them eight years of experience in the industry, 'gained through their employment with a pioneer and prominent CBRF (cross border road freighter) company', which was referring to the plaintiff; and (iii) that the defendant's Smart Lock system was a direct copy of the plaintiff's system called 'E-Lock'. The plaintiff had thus proved its claim of conspiracy to injure on the balance of probabilities. (paras 84-86)

(4) The JC did not commit any plain error that justified appellate interference by this court. There were no good reasons to disturb the finding of fact by the JC. There was no merit in the appeal. (para 87)

Case(s) referred to:

Coco v. AN Clark (Engineers) Ltd [1969] RPC 41 ***(refd)***

Dynacast (Melaka) Sdn Bhd & Ors v. Vision Cast Sdn Bhd & Anor [2016] 6 CLJ 176 FC ***(refd)***

I-Admin (Singapore) Pte Ltd v. Hong Ying Ting And Ors [2020] 1 SLR 1130 ***(refd)***

Karen Yap Chew Ling v. Binary Group Services Bhd & Another Appeal [2023] 7 CLJ 534 CA ***(refd)***

Kuwait Oil Tanker Co SAK & Anor v. Al Bader & Ors [2000] 2 All ER (Comm) 271 ***(refd)***

Lonrho Plc v. Fayed And Others [1991] 3 All ER 303 ***(refd)***

Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***

Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor And Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 103, 106

For the appellant - Roshan Selvaratnam, Tan How Siang, Isaac Stephen Huang & Diong Qian; M/s Peter Huang & Richard

For the respondents - HR Dipendra, Yong Shu Xhuan & Liew Ji Wei; M/s Alwin Rajasurya

[Editor's note: For the High Court judgment, please see OTL Asia Sdn Bhd v. Lee Yik Chieh & Ors [2024] CLJU 1804 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azhahari Kamal Ramli JCA:

Introduction

[1] This is an appeal by the appellants/defendants against the decision of the learned Judicial Commissioner ("JC") dated 30 November 2023, in allowing the respondent/plaintiff's claim founded on breach of confidence and conspiracy to injure. The first and second appellants were the former employees of the respondent being the respondent's marketing manager and general manager respectively. The third appellant is a company doing similar business as the respondent.

[2] In the nutshell, in this case, the former employees of the company had allegedly used the company's confidential information (information that is exclusive to the company) for the employees' own benefit and the benefit of a competitor which they set up to do similar business in the same industry.

[3] In the court below, the respondent filed a writ action praying for the following main reliefs:

(i) a permanent injunction to restrain the appellants/defendants, and each of them, their agents or servants, from dealing and divulging with the respondent/plaintiff's confidential information and documents;

(ii) an order that the appellants/defendants, and each of them, their agents or servants to remove and/or recover from any third parties all the plaintiff/respondent's confidential information and document that they have retained and/or disclosed to the third parties;

(iii) an order for full discovery of particulars where the appellants/defendants, and each of them, their agents or servants have divulged the respondent/plaintiff's confidential information and documents by way of an affidavit within seven days from the date of the court's order;

(iv) an order of delivery of all the respondent/plaintiff's confidential information and document that are in the possession of the appellants/defendants, and each of them, their agents or servant and to provide an undertaking that the appellants/defendants, their agents or servants has not retained any of the respondent/plaintiff's confidential information and documents;

(v) an order for assessment of damages suffered by the respondent/plaintiff; and

(vi) general damages and/or aggravated damages and/or exemplary damages and interest.

[4] After a full trial, the learned JC allowed the respondent/plaintiff's claim and made the following orders:

(i) a permanent injunction restraining the appellants/defendants, and each of them, their agents or servant from using or dealing with or divulging the respondent/plaintiff's confidential information and documents (referred to as CIAD) as pleaded in paras. 53 to 59.34 in the amended statement of claim and particularised and defined in the Schedule A, which was annexed to the learned JC judgment;

(ii) an order that the appellants/defendants, and each of them, affirm and file an affidavit particularising the recipients of the respondent/plaintiff's CIAD (including the full details of the recipients, the manner of receipt, and the date(s) of transmission or dissemination and other necessary particulars to give effect to the judgment within seven days of the judgment, failing which the respondent/plaintiff is given the liberty to make application for the discovery, production or inspection of the evidence necessary to give effect to the judgment);

(iii) an order that the appellants/defendants, and each of them, deliver(s) to the respondent/plaintiff, whether in physical or electronic form, all the CIAD that are in their or their agent's or servant's possession,

custody or control, within seven days from the date of judgment, and each of them to affirm an affidavit that they have done so, and that none of them has retained any of the respondent/plaintiff's CIAD, within ten days from the date of the judgment;

(iv) an order for the assessment of damages suffered by the respondent/plaintiff;

(v) an order that the appellants/defendants, and each of them, pay(s) the respondent/plaintiff the amount of the damages assessed;

(vi) interest at 5% per annum on the total amount of damages assessed and ordered by the court to be paid by the appellants/defendants to the respondent/plaintiff, from the date of the order until the date of full payment;

(vii) costs of RM80,000, which is subject to allocator, to be paid by the appellants/defendants to the respondent/plaintiff by 29 February 2024; and

(viii) the respondent/plaintiff is at liberty to apply.

[5] Dissatisfied with the decision of the learned JC, the appellants/defendants now appeal to this court.

[6] In this judgment, the parties will be referred to as they were in the court below. However, wherever appropriate, we will adopt the learned JC's abbreviations of the parties and or the subject matter before him.

Background Facts

[7] The facts of this case can be gleaned from the pleadings, the submissions of the parties herein and the grounds of judgment of the learned JC. We will adopt them with some modifications.

[8] The plaintiff is a company providing transportation and warehousing related services and management support services. It is a wholly-owned subsidiary of Yamato Asia Pte Ltd and a member of OTL Group of Companies.

[9] The OTL Group is a company focusing on cross-border trucking between China and South East Asia region that covers nine countries and/or regions in China and South East Asia.

[10] The first defendant was offered employment by the plaintiff and at the material time, he was the Marketing Manager of the plaintiff. The first defendant's letter of employment with the plaintiff dated 23 March 2016 operates as the contract of employment between the plaintiff and the first defendant.

[11] The second defendant initially commenced working with the plaintiff on 2 March 2009 as its operating manager. At the material time, he was the General Manager of the plaintiff. The second defendant's letter of employment dated 31 December 2011 with the plaintiff operates as the contract of employment between the plaintiff and the second defendant.

[12] The third defendant is a company in the business of providing similar services as the plaintiff in cross-border transportation. It was incorporated on 28 August 2018.

[13] Clause 8 of the first and second defendants' letter of employment with the plaintiff provides that the first and second defendants are required, during their employment with the plaintiff, to act in the best interest of the plaintiff. The said cl. 8 reads as follows:

> Company's Interest
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> You will be at all times true and faithful to the Company in all respects in the execution of your duties and responsibilities. You will not draw or endorse any bill on behalf of the Company or attempt to do so except so far as you may have been authorised by the Company whether generally or in any particular case. You may not disclose or divulge at any time to any person, firm or corporation secrets or confidential information regarding the business of the Company to which you had access during the continuances of the employment.

[14] As part of its business operation, the plaintiff issued a company handbook ("the company handbook"), which the first and second defendants are obligated to comply with. In the context of this appeal, the following provisions of the company handbook are relevant:

> 1.8.1 Duty of Confidentiality
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> (i) Employees may be granted access to confidential information in the course of their employment with the Company. Such confidential information may include without limitation, their salary and that of their colleague, business methods, corporate plans, management systems, finances, maturing business opportunities, price structure, marketing plan, clientele particulars or contacts, trade secret, secret formulae, processes, innovations, know how discoveries, technical specifications and information, computer programmes, including source and object codes, which may be detrimental to the company if wrongly disclosed or used.
>
> (ii) In respect of such confidential information, the employees shall (whether during employment of thereafter):
>
> (a) Use such confidential information solely for the purpose of fulfilling their employment obligations, and not for their own or another party's benefit, commercial use or for such purpose or in such manner as would within the reasonable contemplation of the employee be detrimental to the interest of the Company;

A (b) Not disclose such information to any other employees or third parties save on the need to know basis for his/her work; and

(c) Not copy, reproduce or reduce to writing any part thereof except for the fulfilment of their employment obligations.

B (iii) Employees shall hold such information on trust for the Company and shall forthwith return all such confidential information as are reduced in writing, drawings, charts or illustrations and contained in any storage media to the Company upon cessation or termination of employment, or upon request by the Company.

1.10.11 Appendix 1 - Code Of Practice

C (1) The employee shall observe this code and other regulations of the Company and maintain the disciplinary rule of the office, and confide and corporate with his/her supervisor, subordinates and colleague and made effort to develop the business.

D (2) The employee shall do his/her best to implement his/her obligations and responsibilities assigned by supervisor's order.

(3) The employee shall make effort to maintain and improve healthy workplace environment and never commit any misconduct (*eg*, sexual harassment or nuisance in the premises of the Company).

E (4) The employee shall not commit any criminal offence which may damage the Company and/or other employees' reputation.

(5) The employee shall not disclose any trade secrets, business matters, corporate plans, management systems, finances, marketing or sales or any past, present or future programs or services, know-how or any other commercial or technical information whatsoever (in any form, including F documentary or electronic) relating to the Company or any other information in respect of which the employees owes an obligation of confidence to any third party during or after his employment except as required by law.

(6) The employee shall not remove any documents or items which belong G to the Company or which contain any confidential information from the Company's premises at any time without proper authorization.

(7) Upon retirement or termination of employment, the employee must return to the Company badges and uniforms as were issued by the Company and all of other items borrowed by the Company.

H (8) The employee shall not utilize the Company's vehicles and any items issued by the Company for private use or without proper authorization.

[15] The first defendant worked for the plaintiff from 23 March 2016 to 18 September 2018. He submitted his resignation from the third defendant on 17 August 2018. However, as the first defendant requested for early I release from his employment with the plaintiff, hence, he was allowed to immediately and effectively resign on 19 September 2018. He had also paid RM13,338.30 to the plaintiff being a payment of salary *in lieu* of notice in order to obtain early release from the employment with the plaintiff.

[16] He was the third defendant's founding director and has been the third defendant's director since its incorporation. He holds 150,000 shares (30%) in the third defendant.

[17] The second defendant worked for the plaintiff from 2 March 2009 to 3 July 2018. He submitted his resignation of employment with immediate effect on 25 June 2018. The plaintiff accepted his resignation *via* email on 26 June 2018. He joined the third defendant on 1 October 2018, approximately one month after its incorporation.

[18] The first defendant is the third defendant's Chief Executive Officer ("CEO").

[19] The second defendant is the third defendant's Chief Operation Officer ("COO").

[20] In the course of their employment, the first and second defendants were given access to various extremely valuable confidential documents and data belonging to the plaintiff. Any unauthorised use by the first and second defendants or any third party will result in severe consequences and damage to the plaintiff. The said confidential documents and data includes but not limited to the following information and documents:

(i) the system work flow including management systems, finances and maturing business opportunities;

(ii) business plan, methods and strategies;

(iii) market plans;

(iv) corporate plans;

(v) existing customer's particulars and contact;

(vi) potential customers particulars and contacts;

(vii) employees information and salary;

(viii) costs and price structure;

(ix) specific routes used for the business transactions;

(x) technical specifications and information computer programs including source and object codes; and

(xi) other technical information concerning the internal structure of the plaintiff.

[21] After the resignation of the first and second defendants from the employment of the plaintiff, a forensic investigation was conducted by the plaintiff. From this investigation, the plaintiff found out that the first defendant had before ceasing his employment with the plaintiff, downloaded,

extracted and/or removed confidential information and documents out from the plaintiff for his own safekeeping. The confidential information and documents are as follows:

(i) backing up all information and documents found on the laptop that was provided to the first defendant by the plaintiff during his employment with the plaintiff to the first defendant's eternal hard disk;

(ii) the plaintiff's organisation chart dated 1 August 2018; and

(iii) the plaintiff's route assessment Thailand Northbound.

[22] From the forensic investigation conducted by the plaintiff, it was discovered that the second defendant has also explicitly downloaded, extracted and/or removed confidential information and documents belonging to the plaintiff by forwarding the same to his personal email account, iames.scv@hotmail.com and copying the said emails to an unknown third party with an email account, wacq001@gmail.com. The extraction of the confidential information and documents by the second defendant as mentioned above include, among others, the following information and documents:

(i) detail of shipper and consignee address in an email dated 2 July 2018;

(ii) business proposal, a PowerPoint presentation dated 18 August 2017 on new routing and solutions in China from OTL China and standard operation procedure (SOP) for storage of Guanxi Overland Total Logistics Co Ltd in an email dated 27 June 2018;

(iii) rate and/or price quotation for railroad services in an email dated 27 June 2018;

(iv) detail on trucking arrangement into Myanmar in an email dated 2 July 2018 between the first and second defendant with a number of customers and/or potential customers;

(v) detail of business arrangement with customers in an email dated 2 July 2018;

(vi) LCL-cost enclosing detail fees of service on a contract signed between WH owner Bac Ky (PCD Tien Son) (customer) and the plaintiff in an email dated 27 June 2018;

(vii) threads of emails between the plaintiff and its customers consisting details and information of agents, customs including customs registered lists, shipping methods, total business plan, trucking and costs arrangement with WICE Logistics Public Company listed in an email dated 2 July 2018;

(viii) details of feeder trucking rates in China enclosing a document on China feeder Pingxiang to various destination in an email dated 27 June 2018;

(ix) price quotation for the plaintiff's services on trip from Penang to China in an email dated 27 June 2018;

(x) railroad services from Prai to PTP and returned trip in an email thread dated 27 June 2018;

(xi) details of air freight from Singapore to Shanghai/Wuhan term including detailed breakdown of the fees in an email thread dated 27 June 2018;

(xii) load test report including shipping details and e-lock container price quotation, FZ hub charges, custom brokerage fees, overtime payment and others in an email dated 27 June 2018;

(xiii) ICD fee at ICD Tienson enclosing hub charges for ICD Tienson and Bangplee FZ in email thread dated 27 June 2018;

(xiv) details of double-decker container enclosing a report on double-decker load test in email thread dated 27 June 2018;

(xv) testing report enclosing pictures of double-decker beam in an email thread dated 27 June 2018;

(xvi) testing report enclosing a document on railway quotation table in an email thread dated 27 June 2018;

(xvii) FCL quotation of CKE enclosing a document on railway quotation table in an email thread dated 27 June 2018;

(xviii) OTL price list enclosing a document on ASEAN cross border LTL trucking service in an email thread dated 27 June 2018;

(xix) a diagram of data logger placement, temperature data summary and multi temperature graph (with and without external ambient) in an email dated 27 June 2018;

(xx) corridor PMI-quick status update enclosing a draft copy of OTL transport service agreement for potential customers in an email dated 27 June 2018;

(xxi) business continuity agreement with Mr Chia enclosing list of key customers, list of customers for OTL, list of AR issue of OTL, list of customers for the plaintiff and list of AR issues of the plaintiff in an email dated 27 June 2018;

(xxii) detail of OTL China based on answers to WD inquiry in an email dated 27 June 2018;

A (xxiii) answers to WD inquiry enclosing a word document of answers to WD inquiry. OTL CN RMA procedure at Shenzhen and OTL CN warehouse SOP in an email dated 27 June 2018;

(xxiv) agility – WD accident post mortem presentation dated 5 January 2018 in an email dated 27 June 2018;

B (xxv) details of accounts management enclosing a list of customers in an email thread dated 27 June 2018;

(xxvi) costing – Vietnam in an email thread dated 27 June 2018;

C (xxvii) cross border trucking-OTL pricing in an email thread dated 27 June 2018;

(xxviii) revised PPT file for Pingxiang project enclosing a powerpoint presentation on new routing and solutions in China dated 18 October 2017 in an email thread dated 27 June 2018;

D (xxix) customer list and pricing of OTL;

(xxx) agenda of meeting on 30 March 2018 between the plaintiff and OTL China in an email dated 27 June 2018;

(xxxi) templates for company business introduction in an email thread E dated 27 June 2018;

(xxxii) enquiry on CBT Penang to Zhe Jiang by 45' air-ride reefer truck in an email thread dated 27 June 2018;

(xxxiii) detailed of South East Asia rail carrier price list in an email thread F dated 26 June 2018;

(xxxiv) details of quotation from the rail carrier from Changsa to Poland in an email thread dated 27 June 2018;

(xxxv) details of GST update on the rate of GST reduced to zero percent effective 1 June 2018 in an email thread dated 27 June 2018;

G (xxxvi) details of new DGF CBFR shipment request clearances customs charges only in an email dated 2 July 2018;

(xxxvii) details of FTL Shipment Ex Tmac To Benoi Road Sin 28 June 2018 (H720005121 & H720005122) 2X40FT in an email dated H 2 July 2018;

(xxxviii) details of Wisetek Thailand shipment to Teleplan Penang in an email dated 2 July 2018;

(xxxix) details of Bollore dedicated truck – 1 x 45ft (e-Lock) from CEVA I Logistic Bukit Jelutong Warehouse to Bangkok, TH to L'oreal, DG cargo in an email dated 2 July 2018;

(xl) details of HANA RFQ 2018 on cross border truck for OTL in an email dated 2 July 2018;

(xli) details of CEVA LTL shipment from Shanghai, China to ICD Vietnam (Consignee MINH) pickup on 27 June 2018 in an email dated 2 July 2018;

(xlii) details of contact information of Narita booking shipment from Hong Kong and Shenzen to Myanmar (bonded warehouse) pickup on 29 June 2018 (1 x 45ft) in an email dated 2 July 2018;

(xliii) details of inquiry of FTL cost from JHB and SIN to TH Celestica in an email dated 2 July 2018; and

(xliv) customer's invoice.

[23] The plaintiff pleaded that the information and details pertaining to all existing customers, potential customers, agents, business partners and any other person or entities that have business dealings with the plaintiff were fully accessible to the second defendant; even after his termination as the second defendant had extracted the relevant details and information of the plaintiff's customers from the plaintiff without authorisation. The plaintiff's confidential information and documents were retained and/or extracted by the first and second defendants without obtaining any authorisation and/or consent from the plaintiff.

[24] The plaintiff asserted that the confidential information and documents were exclusive to the plaintiff and cannot be found in the public domain. These are strictly confidential and trade secrets of the plaintiff and its subsidiaries and are extremely valuable to the plaintiff and its subsidiaries and any unauthorised use by the defendants or any third parties will result in severe consequences and damage to the plaintiff.

[25] In this regard, the first and second defendants also owed an implied duty of confidentiality, loyalty, honesty, good faith and fidelity to the plaintiff and not to use or disclose the confidential information and documents to their own benefit or to the benefit of third parties without the authorisation of the plaintiff.

[26] It is contended by the plaintiff that the retention and/or extraction of the plaintiff's confidential information and documents by the first defendant and/or the second defendant was done to fulfil and/or facilitate the setting up of the third defendant and to assist with the operation of the third defendant.

[27] The plaintiff pleaded that soon shortly after the termination of the employment of the second defendant which took effect on 2 July 2018, a business plan for a new company/entity/and/or organisation was recovered from the second defendant's company laptop which he used while in the employ of the plaintiff.

[28] Subsequently, the plaintiff discovered that on or around October 2018, the first defendant and/or the second defendant had approached six of the plaintiff's existing customers to promote the third defendant and subsequently offer services of the third defendant.

[29] The plaintiff managed to obtain the company profile of the third defendant. The plaintiff contended that the first and/or the second defendants had used and utilised the plaintiff's confidential information and documents when producing the company profile of the third defendant which is largely similar if not the same as the company profile of the plaintiff. In short, the first defendant and/or the second defendant had used the plaintiff's confidential information and documents for their personal use in promoting the third defendant to the detriment of the plaintiff.

[30] The plaintiff also contended that the first and second defendants have breached their duty of confidentiality, loyalty, honesty, good faith and fidelity and ultimately breaching the express and/or implied terms and condition of their letter of offer of employment and the company handbook.

[31] In respect of the third defendant, it was contended by the plaintiff that the incorporation of the third defendant by the first and second defendants who are the former employees of the plaintiff, by relying and/or utilising the confidential information and documents of the plaintiff was done with the predominant purpose of injuring the plaintiff's business and depriving the plaintiff from the profit and gains, which the plaintiff could have made from the plaintiff's business with its existing customers and also through the benefiting of the plaintiff's confidential information and documents.

[32] The plaintiff claimed that the first defendant and/or the second defendant had been maliciously with *mala fide* intention and deliberately conspired in the setting up of the third defendant which has the same nature of business with the plaintiff to profit and subsequently affect the operations of the plaintiff. The identical nature of the third defendant has caused losses and/or potential losses to the plaintiff and that both the first defendant and/or the second defendant at all material times were aware of that their conduct and actions would be detrimental to the plaintiff.

[33] The plaintiff further claimed that the first defendant and/or the second defendant conduct of attempting to poach the existing customers of the plaintiff by relying and/or using the plaintiff's confidential information and documents gives them an unfair advantage over the plaintiff as the first defendant and/or the second defendant have knowledge and access to the pricing and delivery routes of the plaintiff.

Summary Of The Decision Of The Learned JC

[34] In allowing the plaintiff's claim, the learned JC relied on the case of *Dynacast (Melaka) Sdn Bhd & Ors v. Vision Cast Sdn Bhd & Anor* [2016] 6 CLJ 176; [2016] 3 MLJ 417; [2016] 4 MLRA 346. In the context of the present case, the learned JC ruled that the company handbook contains the rules, regulations, procedures and policies that govern the relationship between the plaintiff, as the employer, and its employees including the first defendant and the second defendant. The first defendant's feigned ignorance about the company handbook is untenable because the plaintiff had conducted two training sessions to brief its employees about the company handbook and the first defendant attended both training sessions. Hence, the terms of the company handbook are binding the first defendant and the second defendant.

[35] In respect of the first defendant, the learned JC made the following finding of facts:

(i) he downloaded the plaintiff's confidential information and documents contained in the work laptop given to him, onto his own external hard drive. He did it on 17 September 2018 while he was on his resignation notice, and two days before he stopped working with the plaintiff on 19 September 2018. The evidence of the first defendant downloading of the confidential information and documents was extracted and produced by the plaintiff's expert witness; and

(ii) the learned JC found that the first defendant's explanation that because of a ransomware attack in the past, the plaintiff's personnel were instructed to back up the data that in their respective work computers and that the first defendant stated that he downloaded the content of his work laptop onto his external hard drive, in compliance with this instruction, to be incredible. This is because, he downloaded the confidential information and documents a day before he wrote to the plaintiff for an early release and merely two days before his last day of work in the plaintiff. The learned JC disbelieved that the first defendant was merely diligently complying with work protocols. More importantly, the learned JC found that by 17 September 2018, the first defendant had struck a deal with WICE Co Ltd (WISE) for WICE to finance him to incorporate the third defendant. Further, WICE, a Thai company, was, at the time, the plaintiff's customer. The first defendant formed a partnership with WICE in what the first defendant called a "chance of a lifetime" opportunity to set up the third defendant to do the same business as the plaintiff, intending to get the third defendant publicly listed in five years.

[36] In respect of the second defendant, the learned JC found that:

(i) the second defendant extracted and downloaded the plaintiff's confidential information and documents and forwarded them by email to his personal account and another email account on 27 June 2018 (two days after he resigned) and on 2 July 2018 (seven days after he resigned);

(ii) the second defendant admitted that the plaintiff's confidential information and documents he downloaded were critical company information and essential information for him to perform his job at the plaintiff as a general manager;

(iii) the second defendant admitted that his employment agreement with the plaintiff that he was not supposed to use the plaintiff's confidential information and documents;

(iv) the second defendant's excuse for sending the information downloaded and forwarded to himself (*ie*, he needed to be able to access the plaintiff's confidential information and documents when he did not have access to his work laptop) was obliterated by his admission that, among others, his employment agreement with the plaintiff that he was not supposed to use the plaintiff's confidential information and documents; and

(v) the second defendant's admission discloses his wrongful purpose, *ie*, to have access to the plaintiff's while his employment agreement with the plaintiff which he was not supposed to use the plaintiff's confidential information and documents when he no longer worked for the plaintiff.

[37] The learned JC also found that both the first and second defendants did not produce evidence that either they asked for, or were given the authority or permission to download the plaintiff's confidential information and documents onto an external hard drive, or to forward them to their personal email accounts. They also did not produce evidence that they had informed the plaintiff that they were downloading the plaintiff's confidential information and documents for their own use or for some other use.

[38] Applying the case of *Dynacast (Melaka)* (*supra*), the learned JC ruled that:

(i) firstly, the plaintiff's confidential information and documents, which contains particulars of price, costs, routes and client's requirement and preferences, are confidential in nature, quality and character;

(ii) secondly, the plaintiff's confidential information and documents were imparted to the first defendant and second defendant in circumstances that place an obligation of confidence on the first defendant and the second defendant. The evidence shows that the first defendant and the

second defendant, as the plaintiff's employees, were in possession of the plaintiff's confidential information and documents because of their work, which undoubtedly carries with it the obligation to keep the confidential information and documents confidential; and

(iii) thirdly, on the element of the first defendant and the second defendant's unauthorised use of the plaintiff's confidential information and documents to the plaintiff's detriment, the evidence shows that:

(a) the first defendant and the second defendant took the plaintiff's confidential information and documents by downloading the confidential information and documents into his external hard drive and by forwarding the same to himself; and

(b) the first defendant admitted that he partnered with WICE to form the third defendant, with the intention of listing the third defendant in five years. This evidence is the basis on which the learned JC inferred, on the balance of probabilities, that there was, unauthorised use of the plaintiff's confidential information and documents (which was created through 28 years of doing business) for the first defendant, the second defendant and the third defendant's benefit as the plaintiff's confidential information and documents would go a long way to shorten the time that it would normally take for a start-up like the third defendant, in the cross-border logistics industry, to get publicly listed.

[39] The learned JC also found that the plaintiff has suffered detriment. The plaintiff's table of monthly revenue from August 2018 to February 2020 discloses that the plaintiff's monthly revenue, according to clients dropped for that period. The third defendant was incorporated by the first defendant in August 2018. It is no coincidence that as the first defendant and the second defendant left the plaintiff to start doing business with the third defendant, the plaintiff's month-by-month revenue significantly dropped. There is cause and effect between the third defendant starting its business and the plaintiff's continuous drop in monthly revenue.

[40] The learned JC therefore found that the first defendant, the second defendant and the third defendant are liable to the plaintiff for the tort of breach of confidence.

[41] On the claim for tort of conspiracy to injure, the learned JC found that:

(i) the first defendant and the second defendant authored a template general letter to introduce the third defendant and its business to potential customers in which the first defendant and the second defendant offer the use of a state-of-the-art appliance which the named the 'Smart Lock'; and

A (ii) however, the learned JC found that, the first and second defendants' 'Smart Lock' is a direct reference to the plaintiff's 'E-Lock'.

[42] Hence, the learned JC ruled that, on the balance of probabilities, the first defendant, the second defendant and the third defendant's direct reference to the features of the plaintiff's 'E-Lock' constitutes either an B agreement or a combination among the first defendant, the second defendant and the third defendant to get an advantage over the plaintiff, with the purpose of injuring the plaintiff. Further, in this introduction letter, the first defendant and the second defendant represent to the recipients and readers of the letter that they bring with them eight years' experience in the industry C "gained through their employment with a pioneer and prominent CBRF (cross-border road freight) company" – obviously referring to the plaintiff.

[43] The learned JC also ruled that the third defendant's company profile, which would have been prepared in 2018, contained photos which were copied from the plaintiff's October 2017 company profile. The third D defendant's company profile contained the photo of the plaintiff's E-Lock system, but the first defendant, the second defendant and the third defendant merely amended the header for that page to read E-Lock container and to replace the third defendant's logo at the top of the page.

E **[44]** The learned JC also found proof of conspiracy to injure from the fact that the first defendant had incorporated the third defendant while he was still in the employment of the plaintiff, and hence still obligated to serve the plaintiff. The third defendant is the plaintiff's direct competitor, and the evidence shows that there is real and serious risk of a diversion of business from the plaintiff to the third defendant. Further, the second defendant, who F was key personnel in the plaintiff, joined the third defendant, hardly more than a month after he left the plaintiff. Hence it can be inferred that there was a conspiracy among them to injure the plaintiff, for the purpose of enhancing their new venture and business.

G **[45]** Based on the evidence, the learned JC held that, on the balance of probabilities, the plaintiff had proven its case against the defendants.

Summary Of The Submission By The Defendants

[46] It was submitted for the defendants that the learned JC erred when he decided that there has been unauthorised use of the plaintiff's confidential H information and documents by the defendants. In this respect, the defendants submitted that there is no evidence from any of the plaintiff's customers that the defendants had undercut their prices based on the plaintiff's confidential information and documents. There is also no evidence on the exact nature of the business being conducted between the third defendant and the six I customers of the plaintiff (*ie*, DB Schenker China Limited, Agility Logistics Sdn Bhd/Agility Co Ltd, Toray Plastic (M) Sdn Bhd, Expeditors (M) Sdn Bhd, CTI Distribution Pte Ltd and Bifrost Logistics (M) Sdn Bhd) and

the exact business alleged to be poached from these six customers by the third defendant and in what manner did the third defendant acted to the disadvantage of the plaintiff. The plaintiff's assertion justifying their belief about loss of business is premised on the third defendant reduced pricing to convince the six customers to abandon the plaintiff based on the plaintiff's confidential information and documents, is not supported by evidence. It was submitted that the statement of account adduced by the plaintiff to show financial losses and damages suffered by the plaintiff are self-serving internal documents which does not prove the fact that the third defendant had used the plaintiff's confidential information and documents to the plaintiff's detriment.

[47] The defendants also submitted that the act of downloading of the plaintiff's confidential information and documents by the first defendant and the act of forwarding of the confidential information and documents by the second defendant to his own email to the detriment of the plaintiff, as found by the learned JC, does not fulfil the third requirement as defined in *Dynacast* (*supra*) since the plaintiff did not adduce evidence about the detriment suffered by the plaintiff as a result of the first defendant and second defendant's unauthorised acts.

[48] It was further submitted that the learned JC erred when he inferred that there was an unauthorised usage of the plaintiff's confidential information and documents to the benefit of the defendant simply base on an admission by the first defendant that he partnered with WICE to form the third defendant with a view of publicly listing the third defendant in five years. Such admission does not justify a finding that there is unauthorised use of the confidential information and documents.

[49] The defendants also contended that the learned JC had erred in adopting the 'modified approach' in determining the issue of breach of confidence by shifting the burden on the defendants to show that they have not used the confidential information and documents to their benefit and to the plaintiff's detriment. It was further contended that the plaintiff never complained of suffering any injustice in pursuing their claim; no complaint was ever made about their difficulties in proving their case against the defendants. The defendants claimed that they were left in a real situation of uncertainty as to which test applies, the test laid in *Dynacast (Melaka)* case (*supra*) or the modified approach as decided in the Singapore case of *I-Admin (Singapore) Pte Ltd v. Hong Ying Ting And Ors* [2020] 1 SLR 1130.

[50] The defendants further submitted that the learned JC erred in finding that the defendants had committed conspiracy to injure on the following reasons:

A (i) there is nothing wrong with the former employee of the plaintiff (*ie*, the first defendant and the second defendant) incorporating a company such as the third defendant as any such prohibition, if in place, amounts to a restriction in trade prohibited by law, a point which was not considered by the learned JC; and

B (ii) in finding that the plaintiff has suffered loss and damages during and after the third defendant's incorporation, the learned JC had relied on a self-serving statement of account which is not the best evidence as compared to the affected customers who may shed light on the actual state of affairs *vis-à-vis* their business dealing with the plaintiff.

C *Summary Of The Submission By The Plaintiff*

[51] The plaintiff submitted that the defendants have conceded that the plaintiff's confidential information and documents they downloaded or extracted carries with it a quality of confidence and were imparted to them
D in circumstances importing an obligation of confidence. In any event, it was also submitted that the evidence adduced by the plaintiff with regard the duty of confidentiality and fidelity under the terms and conditions of the first defendant and the second defendant's letter of employment and the company handbook remained unchallenged and unrebutted. In this respect, the first
E defendant and the second defendant downloaded and extracted the plaintiff's confidential information and documents just days before leaving the plaintiff's employment. The confidential nature of the plaintiff's confidential information and documents was used among others, to benefit the newly incorporated company, *ie*, the third defendant. From the evidence adduced during the trial, among others that the third defendant was incorporated with
F the objective of competing in the same cross-border business as the plaintiff, when considered in its entirety, can only irresistibly mean that on a balance of probabilities, there was unauthorised use of the respondent's confidential information and documents by the defendants to the detriment of the plaintiff.

G **[52]** It is the plaintiff's submission that the learned JC did not shift the burden of proof by adopting the modified approach promulgated by the *I-Admin* (*supra*). The reliance on the modified approach was only used to supplement the existing legal framework when a court considers unauthorised use of confidential information to the detriment of an aggrieved
H party. The modified approach was promoted to overcome the conceptual challenges and current vicissitudes in establishing the element of unauthorised use of confidential information. As against this fact, the defendant did not furnish any evidence to show that there was no unauthorised use of the confidential information.

I

[53] With regards to the claim of conspiracy to injure, the following facts are pertinent: A

(i) the downloading and extraction by the first defendant and the second defendant of the plaintiff's confidential information and documents; and

(ii) the incorporation of the third defendant and evidence such as the third defendant's introducing letter, company profile and promotion of the third defendant's locking system all of which were designed to convince the plaintiff's client that the third defendant can replicate the business of the plaintiff. B

[54] The above facts have demonstrated, on the balance of probabilities, that the plaintiff has made out the critical elements to establish a conspiracy to injure the respondent. C

Our Analysis And Findings

[55] The main issue in this appeal is whether the elements of breach of confidence and conspiracy to injure have been established by the plaintiff. However, we remind ourselves of the 'reluctance' of the appellate court in interfering with the decision of the trial court especially concerning the finding of fact. Hence, in *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25; [2012] 5 MLRA 618, the Federal Court states: D E

> On matters of finding of facts and legitimate exercise of discretion by the courts of original jurisdiction is also often not interfered with by the appellate courts. An appellate court would normally not want to substitute its own subjective assessment of these matters to findings and conclusions arrived at by courts from where the decisions are appealed from. The other reason, of course, is that the appellate court is going to be flooded by appeals if it would be too easily persuaded to substitute its own decision in those instances. After all each judge has his own subjective view on many issues. This is so in spite of the fact that we judges have gone through the same training and perhaps gone through the same experience but we still decide differently. F G

Claim For Breach Of Confidence

[56] It is generally understood that the tort of breach of confidence is governed by common law and the contractual obligations of the parties. In facing today's business reality and in order to maintain sustainability in a highly competitive economy, there is a need for companies to keep trade secret, especially on the business know-how not known nor available in public domain. H

[57] In so far as an employee is concerned, the relationship between employers and employees would give rise to a duty of confidentiality encompassing a more general duty of fidelity. This normally arises in the course of employment and contains part of the term of employment between I

an employer and employee. Under this principle, the employee must act in the best interest of the company, including the protection of confidential information and trade secret of the company. Be that as it may, it is also common that an employee would be offered employment by the company's competitors or would embark on a business similar to his employer.

[58] Hence, there is the need to protect the interest of the company and the right of an employee to seek employment in similar industry with the knowledge gained from the previous employment.

[59] In the case of *Dynacast (Melaka)* (*supra*), the Federal Court accepted the test in determining breach of confidence in the case of *Coco v. AN Clark (Engineers) Ltd* [1969] RPC 41 as follows:

> [31] Learned counsel for the plaintiffs submitted that the general rule of information sought to be protected as confidential information must have the necessary quality of confidence in it and applies only in circumstances where there is no applicable confidential clause operative between the parties. The rule does not apply where as in this instant case an express clause has been agreed by the parties. It then becomes only an enforcement of a contractual clause. This submission appears to echo what Megarry J said in *Coco v. AN Clark (Engineers) Ltd* [1969] RPC 41 at pp. 46-47:
>
> > In the case before me, it is common ground that there is no question of any breach of contract, for no contract ever came into existence. Accordingly, what I have to consider is pure equitable doctrine of confidence, unaffected by contract.
> >
> > ...
> >
> > In my judgment, three elements are normally required, if apart from the contract, a case of breach of confidence is to succeed. *First, the information itself, in the words of Lord Greene, MR in the Salman case on p. 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it*.
>
> (emphasis added)

[60] It can be summarised that the cause of action for breach of confidence is founded on these three elements:

(i) that the information was of confidential nature;

(ii) that it was communicated in circumstances importing an obligation of confidence; and

(iii) that there was an unauthorised use of the information to the detriment of the party communicating it.

[61] Our task in this appeal has been made slightly easier by the concession made by the defendants that they will be only challenging the learned JC's finding on the third element of breach of confidence, *ie*, that there was an unauthorised use of the information to the detriment of the party communicating it. By this concession, the defendants have admitted the confidential nature of the plaintiff's confidential information and documents; and the plaintiff's confidential information and documents were imparted to them in circumstances importing an obligation of confidence.

[62] I pause here to deal with the defendant's contention that the learned JC erred when he shifted the burden of proof of the elements of breach of confidence to the defendants by applying the case of *I-Admin (Singapore) Pte Ltd v. Hong Ying Ting And Others* [2020] 1 SLR 1130.

[63] In this appeal, it is elementary that the party who alleges the breach of confidence bears the burden proof of proving the three elements as aforesaid. He who asserts must prove (ss. 101 and 102 of the Evidence Act 1950 (the EA)). Further, s. 106 of the EA provides that:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[64] However, the case of *Karen Yap Chew Ling v. Binary Group Services Bhd & Another Appeal* [2023] 7 CLJ 534; [2023] 4 MLJ 792, the Court of Appeal seems to have accepted and applied the Singapore case of *I-Admin* which had introduced the modified approach in dealing with the burden of proof of the three elements. In *Karen Yap Chew Ling*, Lee Swee Seng, JCA (as he then was) eloquently states:

> [89] Learned counsel for the plaintiff alerted us to the recent developments in Singapore where the Court of Appeal in *I-Admin (Singapore) Pte Ltd v. Hong Ying Ting And Others* [2020] 1 SLR 1130, recently modified the burden of proof in an action for breach of confidence as follows:
>
> > 61. Upon the satisfaction of these prerequisites (the first 2 requirements in *Coco*), an action for the breach of confidence is presumed. This might be displaced where, for instance, the defendant came across the information by accident or was unaware of its confidential nature or believed there to be strong public interest in disclosing it.
> >
> > Whatever the explanation, the burden will be on the defendant to prove that its conscience was unaffected. In our view, this modified approach places greater focus on the wrongful loss interest without undermining the protection of the wrongful interest.
> >
> > 62. A shift in the burden of proof also addresses difficulties faced by owners of confidential information in bringing a claim in confidence ... defendants are comparatively better positioned to account for their suspected wrongdoing.

A [90] It appears to be another way of saying that once the plaintiff has adduced *prima facie* evidence of a breach of confidential information, the evidential burden shifts to the defendant to rebut and refute. There is already a breach of confidential information by unlawfully accessing and storing it such that one may have already access to it and deploy it whenever one needs it.

B [91] Even if as yet, nothing could be shown on how it has been unlawfully used for the profit of another, the very act of unlawfully copying and assessing is enough violation of the plaintiff's right to the integrity and exclusive use of the confidential information such that a case for exemplary damages may be made out. It is no different from a thief who C has been caught with the stolen item and who then has the audacity to say that the owner has suffered no loss as he has not realised it was stolen and the stolen item has since been returned.

[65] It must be noted that in *Karen Yap* (*supra*), this court did not expressly state that the modified approach in *I-Admin* (*supra*) is to be adopted by our D court and that the burden of proof of the unauthorised use of the information be shifted to the defendants after proof of the first two element of breach of confidence. There is good reason for the court in *Karen Yap* not to expressly endorse the modified approach in *I-Admin* (*supra*) because, to do otherwise, would be inconsistent with ss. 101, 102, 103 and 106 of the EA. The burden E of proof remains with the plaintiff unless there is clear provision allowing presumption of certain fact in the plaintiff's claim. However, *I-Admin* is relevant to the issue of evidential burden, *ie*, once *prima facie* evidence of breach of confidence is established, the defendant has the evidential burden to rebut and refute the *prima facie* case.

F **[66]** The defendant also referred to para. [79] of the learned JC's grounds of judgment to support their contention of the so-call shift of the burden of proof. In para. [79] the learned JC states:

[79] In any event-following the progressive principle propounded in I-*Admin (Singapore)*, which I prefer to the *1969 Coco v. AN Clark* G conventional approach – I find that D1D2 and ETL did not produce any evidence that directly proves, or any evidence from which it can be inferred, that there was no unauthorised use of OTL's CIAD to OTL detriment. Or conversely, that their use of OTL's CIAD was authorised. Or, where D1D2 and ETL used OTL's CIAD, their use of OTL's CIAD did not cause OTL any loss or damage, *ie*, did not lead to OTL's H detriment.

[67] We find this contention misleading. It must be emphasised that the learned JC had also dealt with the third element of breach of confidence in paras. [69], [70], [71] and [72] of his grounds of judgment. In summary, the learned JC found that the first and second defendants had downloaded the I plaintiff's confidential information and document into his external hard drive

and forwarding it to the second defendant. The learned JC also found that the first defendant had admitted that he partnered with WICE to form the third defendant with the ambitious objective of listing the third defendant in five years. Taking the two facts together the learned JC then made an inference that there was in some manner, unauthorised use of the plaintiff's confidential information and document and that the first defendant and the second defendant have had no other pertinent purpose for getting the plaintiff's confidential information and document but to use it to accelerate and enhance the third defendant's business and at the same time inevitably cause detriment to the plaintiff. We are not with the defendant on this issue.

[68] We will now deal with the third element in proving breach of confidence. The plaintiff must prove that there was an unauthorised use of the information by the defendants to the detriment of the plaintiff.

[69] In determining this issue, we are of the view that the following facts are relevant:

(i) the first defendant worked for the plaintiff from April 2016 to 18 September 2018;

(ii) the first defendant resigned from the plaintiff on 17 August 2018. While he was serving out the notice period, he wrote to the plaintiff on 18 September 2018 for an early release. He stopped work on 19 September 2018;

(iii) the forensic investigation on the work laptop of the first defendant revealed that on 17 September 2018 he had downloaded the plaintiff's confidential information and document contained in the work laptop into an external hard drive. On 17 September 2018, the first defendant had already struck an agreement with WICE for WICE to finance him to incorporate the third defendant;

(iv) the first defendant incorporated the third defendant on 28 August 2018 and became its Chief Executive Officer;

(v) the second defendant worked for the plaintiff from March 2009 to 3 July 2018;

(vi) the second defendant resigned from the plaintiff on 25 June 2018;

(vii) on 27 June 2018 and 2 July 2018, the second defendant extracted and downloaded the plaintiff's confidential information and document and forwarded them by email to his two email accounts. He admitted that under his employment agreement with the plaintiff, he knew that he was not supposed to use the plaintiff's confidential information and document;

(viii) two months after the incorporation of the third defendant, the plaintiff discovered that the defendants have approached at least six of the plaintiff's customers to persuade them to use the third defendant services; and

(ix) the first defendant admitted that he partnered with WICE to form the third defendant with the ambitious objective of listing the third defendant in five years.

[70] Based on the above facts, the learned JC concluded that:

> [71] Why else would D1D2 download and forward to themselves OTL's CIAD? This evidence is the basis on which I find, on the balance of probabilities, that D1D2 could had no other pertinent purpose for getting OTL's CIAD but to use the CIAD to accelerate and enhance ETL's business. And by doing so, they would inevitably cause detriment to ETL.

[71] We are of the considered view that the learned JC did not err in making the necessary inference of the use of the confidential information and document as the circumstances of the copying into an external hard drive and the emailing of the confidential information and document to themselves just before the first defendant and the second defendant left the plaintiff had not been sufficiently explained or excused. Of importance is the proximity of time of the following events:

(i) the first defendant's notice of resignation (17 August 2018), his notice for an early release (18 September 2018), the agreement between the first defendant and WICE to set up the third defendant (7 September 2018), the time he extracted and downloaded the plaintiff's CIAD into his external hard drive (17 September 2018) and his last day of work with the plaintiff (19 September 2018) and the incorporation of the third defendant (28 August 2018); and

(ii) the second defendant's resignation from the plaintiff (25 June 2018), the time he extracted and downloaded the plaintiff's confidential information and document and forwarded them by email to his two email accounts (27 June 2018 and 2 July 2018), the time he joined the third defendant (1 October 2018, *ie*, about two months after the incorporation of the third defendant).

[72] The above timeline is crucial as it shows that the first defendant and the second defendant had at all times intended to use the plaintiff's confidential information and document to facilitate the setting up of the third defendant. We are minded that the information in the plaintiff's confidential information and document may be gathered by the defendants in the making of their own market survey and doing their own compilation on, among others, the pricing, routes and particulars of customers, it does not make the existing confidential information and document which the first defendant and second defendant had downloaded and kept, less confidential. These

information gives the defendants an advantage when starting their business which is similar to the plaintiff's. It is the head start that the defendants would gain by harnessing such confidential information and document to gain an unfair advantage in a quick start-up.

[73] It must be noted that the learned JC did not accept the explanation proffered by the first defendant and the second defendant about their act of extraction, downloading and emailing the confidential information and document to their email accounts. In this regard, the first defendant stated that because of a ransomware attack in the past, the plaintiff's personnel were instructed to back up the data in their respective work computers; the first defendant stated that he downloaded the content of his work laptop onto his external hard drive, in compliance with this instruction. Whereas the second defendant's excuse for sending the information downloaded and forwarded to himself is that he needed to be able to access to the plaintiff's confidential information and documents whenever he did not have access to his work laptop.

[74] In the light of the facts as discussed in para. 69(i) to (ix) above, we are of the view that the learned JC did not err when he rejected the first and second defendants' explanation. In any event, even if the first defendant and second defendant were labouring under such a need to back up, they surely must return the confidential information and document in the external hard drive upon leaving the plaintiff. This is further supported by the second defendant's admission that the plaintiff's confidential information and documents he downloaded were critical company information and essential information for him to perform his job as a general manager.

[75] We also bear in mind that s. 106 of the EA, which provides that when evidence is within the knowledge of any person, the burden of proving that fact is upon him. In the context of this appeal, only the defendants would know how they had used wrongfully, in breach of the confidential nature of the information. Hence it behoves them to produce evidence to discharge the evidential burden to rebut the inference made by the learned JC.

Whether The Plaintiff Has Proved The Issue Of Detriment

[76] The defendants maintained that the learned JC had wrongly decided on the issue of detriment. On this issue, the learned JC found that the plaintiff had suffered loss and states as follows:

> [73] OTL's table of monthly revenue from August 2018 to February 2020 discloses that OTL's monthly revenue according to clients, dropped for that period. August 2018 was when D1 incorporated ETL. September to October 2018 was when D1D2 started ETL's directly competing business.
>
> [74] D1D2 and ETL needed to get business fast. D1 testified that he had the task of achieving the kind of high-level business that would enable ETL to be listed on the stock exchange in a mere five years. Armed with

A OTL's CIAD, which was acquired and formulated over three decades of business, D1D2 and ETL could fast-track ETL to the volume of business and level of revenue that could take EPL public.

[75] I find that it is not a coincidence that just as D1D2 left OTL to start doing business through ETL, OTL's month-to-month revenue
B significantly dropped. There is a cause and effect between ETL starting business and OTL's continued drop in monthly revenue.

[76] Taking three of OTL's customers -Biforst, Agility and DBS:

(i) Bifrorst – RM459,000 (in August 2018) dropped to RMO (by February 2020)

C

(ii) Agility – RM3.3 m (in August 2018), dropped to RM761,000 (by Feb 2020); and

(iii) DBS – RM 958,000 (in August 2018) dropped to RM17,000 (by February 2020)

D **[77]** Further, from the plaintiff's group of companies' statement of account, we find that there was a steady decline of revenue from January 2019 to July 2019 compared to a steady six-figure revenue from August 2019 to July 2019. It was also shown that there was no business coming from WICE at all starting from August 2019 until February 2020. The plaintiff's operating
E profit margins (OPM) from August 2018 to December 2018 also show a consistent loss compared to positive figure between May 2018 to July 2018. This fact was confirmed by the plaintiff's witness (PW1) that while the plaintiff had a steady rise of OPM for the period of May 2018 to July 2018, the plaintiff suffered a consistent period of loss from the month of August 2018 onwards leading to a yearly loss of OPM in the range of – 1.6%. The
F plaintiff also suffered a culminated loss of – 6.19% for the year 2019 and as at February 2020, its OPM showed a substantive drop to – 13.90%.

[78] The defendants submitted that it is wrong for the learned JC to rely on this 'self-serving' statement of account and insisted that the plaintiff
G should have called the representative of the existing customers and show evidence that the defendants had utilised the confidential information and document to gain unfair advantage over the plaintiff in conducting similar business. We disagree with the defendants on this. The statement of accounts clearly recorded the plaintiff's earnings from the customers including its six biggest customers (DB Schenker China Limited, Agility Logistics Sdn Bhd/
H Agility Co Ltd, Toray Plastic (M) Sdn Bhd, Expeditors (M) Sdn Bhd, CTI Distribution Pte Ltd and Bifrost Logistics (M) Sdn Bhd). It was prepared based on the company's records should be accepted as *prima facie* evidence of the facts stated therein.

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[79] At the risk of being repetitive, it must be noted that the plaintiff had discovered that the defendants had been approaching six of the plaintiff's main customers barely two months after the third defendant's incorporation on 28 August 2018. The statement of account shows that the plaintiff had suffered financial loss almost immediately after the first and second defendants left the plaintiff and the setting up of the third defendant. Therefore, it is not unreasonable to infer that the plaintiff's financial losses were caused by the unauthorised use of the plaintiff's confidential information and document. In our view, the detriment suffered by the plaintiff was in the form of financial loss in its business. In this respect, the defendants did not adduce any evidence to rebut the plaintiff's financial statement. Hence, we find no reason to disagree with the learned JC's finding that there was unauthorised use of the plaintiff's confidential information and document to the detriment of the plaintiff.

Whether The Plaintiff Has Proved Conspiracy To Injure

[80] The tort of conspiracy to injure can be summarises as tort of two or more person agreeing to harm another person through either unlawful means or by using lawful means for the predominant purpose of causing injury or loss suffered by a person. This statement of law was discussed in *Kuwait Oil Tanker Co SAK & Anor v. Al Bader & Ors* [2000] 2 All ER (Comm) 271 as follows:

> 107 ... It is common ground that there are two types of actionable conspiracy, conspiracy to injure by lawful means and conspiracy to injure by unlawful means. The first is sometimes described simply as a conspiracy to injure and the second as a conspiracy to use an unlawful means (see *eg*, *Clerk and Lindsell on Torts* (17th edn, 1995) pp. 1267-1268, paras 23-76). In our view they are both conspiracies to injure and their ingredients are the same, with one crucial difference. In both cases there must be conspiracy to injure the claimant, but in the first case (in which the means employed would otherwise be lawful) the predominant purpose of the conspiracy must be to injure the claimant whereas in the second case, although the defendant must intend to injure the claimant, injury to the claimant need not be his predominant purpose.
>
> 108. We shall treat them as different torts, although, as it seems to us, they are better regarded as species of the same tort. It matters not. For present purposes we would define them as follows. (1) A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant. (2) A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant another person or persons to injure

A him by lawful means, whether or not it is the predominant purpose of the defendant to do so. We shall call them 'a lawful means conspiracy' and 'an unlawful means conspiracy' respectively.

...

B 111. A feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as a judge pointed out (at p. 124), it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, *albeit* tacitly, to achieve common end.

C **[81]** In the Court of Appeal case *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394; [2008] 3 MLRA 504, the main element of conspiracy that need to be established are:

(i) a combination or an agreement between two or more persons;

D (ii) an intent or for the purpose of injuring another;

(iii) that acts are carried out in accordance with that agreement and that intention; and

(iv) resulted in loss or damage to another.

E **[82]** Further guidance on this subject can be obtained from the case of *Lonrho Plc v. Fayed And Others* [1991] 3 All ER 303 where the House of Lords stated that the tort of conspiracy can be categorised as: (i) conspiracy to injure by the use of lawful means; and (ii) conspiracy to perform an unlawful act or to use unlawful means. It was held that:

F The tort of conspiracy to injure could be established either by showing that an intention to injure the plaintiff in his trade or business was the predominant purpose of the conspirators, even though the means used to inflict damage on the plaintiff were lawful and would not have been actionable if done by individual, or by showing that unlawful means were used. But when the conspirators intentionally injured the plaintiff and

G used unlawful means to do so, it was no defence for them to show their primary or predominant purpose had been to further or protect some legitimate interest of their own: it was sufficient to make their action tortious that they used unlawful means.

It followed that although the plaintiff had not pleaded that the the

H defendant's intention to cause injury to the plaintiff was the predominant purpose of their alleged unlawful action that was not a ground for striking out the cause of action in conspiracy. Furthermore, since as pleaded the cause of action founded on unlawful interference with trade or business and the cause of action in conspiracy stood or fell together it would be inappropriate to strike out the statement of claim ...

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[83] Based on the above statement of law, it may be summarised that in establishing conspiracy to injure, it is pertinent for the plaintiff to prove that there is an agreement or arrangement between the defendant and another person to cause injury to the plaintiff; and that the predominant purpose of this agreement or arrangement is to injure the plaintiff. There may not be express agreement among the conspirator; it suffices if two or more persons act together with a common intention, knowingly agree to pursue a common objective, *ie*, to injure the plaintiff. The court is entitled to consider all evidence before him and to make the necessary inference that could make out a case for conspiracy. Hence, while the elements of conspiracy is a question of law, to prove those elements is a question of fact that would depend on the evidence adduced during the trial. Connected with these elements is the question of damages suffered by the plaintiff.

[84] Coupled with the evidence that have proven the defendants' unauthorised use of the plaintiff confidential information and document as highlighted in para. 69(i) to (ix) above, the plaintiff's claim for conspiracy to injure is fortified by the following facts found by the learned JC:

(i) the first and/or the second defendant created a template general letter to introduce the third defendant and its business to its customers. In this letter, the first defendant and the second defendant offered the use of a state-of-the-art appliance which they named 'Smart Lock' which the first defendant and the second defendant described as 'an inner locking device using WiFi signal to upgrade the reliability on the activation and deactivation of the inner locking mechanism';

(ii) in this introduction letter, the first defendant and the second defendant represent to the recipients of the letter that they bring with them eight years of experience in the industry, 'gained through their employment with a pioneer and prominent CBRF (cross-border road freighter) company', which is referring to the plaintiff; and

(iii) that the defendant's smart lock system is a direct copy of the plaintiff's system called 'E-Lock'.

[85] In his grounds of judgment, the learned JC ruled that the defendants' smart lock system is a direct reference to the plaintiff's E-Lock system and found as follows:

> [85] I find, however, that D1D2's Smart Lock is a direct reference to OTL's E-Lock. The proprietary information of OTL's E-Lock system includes information such as:
>
> (1) there is no way to lock or unlock the container from outside the container;
>
> (2) the E-Lock can only be locked and unlocked by mobile phone SMS, barcode scanner or a unique keypad;

A (3) OTL is the only company that owns the E-Lock system in the region where they do business.

[86] Although this information about OTL's E-Lock may not be information that is meant to be confidential, I refer to it in my consideration of OTL's cause of action for conspiracy to injure. The fact
B that D1D2 made a direct reference to OTL's E-Lock contributes to the evidence that satisfies two of the three elements of cause of action for conspiracy to injure, namely:

(1) there was an agreement or a combination of efforts among D1D2 and ETL to injure OTL; and

C (2) there were acts committed under this agreement or combination to injure OTL.

[86] We find that the learned JC is not plainly wrong in his finding. It is supported by relevant facts before him and after an objective evaluation on the credibility and reliability of the witnesses called by the parties. We agree
D that the plaintiff has proved its claim of conspiracy to injure on the balance of probabilities.

Conclusion

[87] Based on the materials before us, we find that the learned JC did not
E commit any plain error that justifies appellate interference by this court. We see no good reasons to disturb the finding of fact of the learned JC as we cannot say that he had misappreciated the evidence before him. There is no merit in the appellant appeal. We affirmed the decision of the learned JC. The appeal is dismissed with costs of RM20,000 to the respondent subject
F to allocator.

[88] There remain one small issue pertaining to this appeal. The appellants seemed to be anxious as to how assessment of damages would be done having regard to the expert report that the respondent had filed to prove the value of the confidential information and document. In our view, that goes to
G quantum, and that at the assessment of damages stage the respondent would still have to show the nexus between the breach of the confidential information and document and the loss to the detriment suffered by the respondent. In fact, the appellants can also call their own expert to comment on and challenge the respondent's expert report and call their own expert to
H produce their own expert report on how the confidential information and document had or had not been monetised for the profit of the appellants to the detriment of the respondent.

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